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No. 90-6531

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1990

KEITH HUDSON,
Petitioner,

— against —

JACK McMILLIAN, *et al,*
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS,
FOR THE FIFTH CIRCUIT

BRIEF AMICUS CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., IN SUPPORT OF THE REVERSAL OF THE FIFTH CIRCUIT.

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BRIEF AMICUS CURIAE

This brief is filed pursuant to the Rules of the United States Supreme Court. Consent to file has been granted by Counsel for the Petitioner and the Respondents. Letters of Consent of all parties have been filed with the Clerk of this Court, as required by the Rules.

INTEREST OF AMICUS

Americans for Effective Law Enforcement, Inc. (AELE), as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties, and property, within the framework of the various State and Federal Constitutions.

AELE has published since 1975 the "*Jail and Prisoner Law Bulletin,*" a national case law reporter on prisoners' issues, and has sponsored national seminars on Jail Legal Issues since 1977. These seminars use as speakers both plaintiff and defense counsel, as well as representatives of the American Civil Liberties Union, National Prison Project.

AELE has previously appeared as *amicus curiae* over eighty times in the Supreme Court of the United States and over thirty-six times in other courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio, and Missouri.

ARGUMENT

I.

THE FIFTH CIRCUIT'S "SUBSTANTIAL INJURY" RULE IS TOO RESTRICTIVE, AND IMPEDES AN IMPORTANT PURPOSE OF SECTION 1983, TO DISCOURAGE EXCESSIVE FORCE BY LAW ENFORCEMENT AND CORRECTIONAL OFFICERS. THIS COURT SHOULD ESTABLISH A GUIDELINE WHICH REJECTS PETTY COMPLAINTS, BUT PROVIDES REDRESS FOR ESCALATED VIOLENCE.

Amicus, through its educational seminars and publications, stresses the interplay between instilling professional behavior and the legal responsibility for misconduct imposed by 42 U.S.C. Section 1983 litigation. While we deplore false allegations and the many frivolous suits filed by often bored and frequently malicious inmates, we recognize that damage actions brought in federal court are a powerful deterrent to misbehavior by state and local law enforcement and correctional personnel.

The dilemma for this Court is to set guidelines which reject petty disputes, which should not be litigated in a federal forum, while assuring victims of police or correctional brutality of an impartial arena to redress their more serious complaints.

We agree with the statement in *Johnson v. Glick*, 481 F.2d 1028 (2nd Cir. 1973), *cert. den.*, 414 U.S. 1033, 94 S.Ct. 462, that "not every push and shove" or unwarranted slap in the face should be a *federal* civil rights violation. However, there is a large, definable and intermediate step between a shove and a broken bone. It includes the gratuitous kick or punch delivered as punishment. The aftermath of pain may only be a bruise and not a splint, cast, or stitches. Nevertheless, an inmate has "a constitutional right to be free of unprovoked physical assault by agents of the state while in state custody." *Runnels v. Rosendale*, 499 F.2d 733 (9th Cir. 1974).

Law enforcement and correctional officers know the difference between the shove and a kick, or between a slap and a closed-fist punch, as surely as they know the difference between reasonable force and unnecessary punishment. They also know in the Fifth Circuit, how far they can go in abusing a prisoner before they will be held accountable, whether it be in a courtroom or disciplinary setting.

Amicus believes that the so-called "blood and guts" guidepost used to initiate criminal proceedings under 18 U.S. C. Section 242 is too high a threshold for civil actions. Administrative policies and disciplinary rules, however detailed, stimulating, and well-intended, alone cannot prevent officer brutality.

Professional law enforcement and penal administrators need the added support provided by the civil rights laws, and enforced by the courts, to deter the human urge to inflict physical punishment on a misbehaving prisoner. Simply stated, the Fifth Circuit has sent the wrong message to entry-level correctional officers.

In *Johnson v. Morel,* 876 F.2d 477 (5th Cir. 1989), the court below held that an arrestee's civil rights are violated only if *significant injury* resulted from the officer's use of force. This holding was recently reaffirmed in *Hulsey v. State of Texas,* 929 F.2d 168 (5th Cir. 1991); see also *Huguet v. Barnett,* 900 F.2d 838 (5th Cir. 1990). The Fifth Circuit has thus applied its significant injury to all excessive force claims.

Other circuits have wisely rejected this criteria: *McHenry v. Chadwick,* 896 F.2d 184 (6th Cir. 1990); *Jackson v. Crews,* 873 F.2d 1105 (8th Cir. 1989); *Calamia v. City of New York,* 879 F.2d 1025 (2nd Cir. 1989); *Walmsley v. City of Philadelphia,* 872 F.2d 546 (3rd Cir. 1989). The Sixth Circuit has also held that the more unreasonable the use of force, the less severe an injury is needed to state a claim; *Molton v. City of Cleveland,* 839 F.2d 240 (6th Cir. 1988).

While the parties contest the facts and their evidentiary weight, the Magistrate Judge and the Fifth Circuit panel found the force used was unnecessary and that the plaintiff suffered physical injuries, though minor. The panel consid-

ered it to be a "blight" without a remedy and expressed the hope that ". . . someday this blight on our criminal justice system will be forever removed . . ." Unpublished *per curiam* opinion of July 31, 1990 at 3.

We believe that the threat of civil suit in state courts is often an inadequate deterrent to officer misconduct. There are significant impediments which include notice of claim requirements, limitations on damage awards, various statutory immunities, and shortened statutes of limitations. More important are the practical and political realities of an elected judge and a county-selected jury not wanting to penalize law enforcement and correctional officers who reside in their communities. See Geller, *Police Leadership in America* at 227, American Bar Foundation (Chicago: 1985).

II.

COURTS SHOULD DISTINGUISH BETWEEN FORCE REASONABLY BELIEVED TO BE NECESSARY TO OVERCOME RESISTANCE AND THAT WHICH IS INFLICTED AS PUNISHMENT. IN THE FORMER INSTANCE, OFFICERS SHOULD BE ALLOWED A WIDE LATITUDE OF DISCRETION; IN THE LATTER, LITTLE DISCRETION SHOULD BE ALLOWED.

Police officers and correctional personnel are often required to use force to subdue prisoners. They are taught a use-of-force progression, from verbal and hand-hold compliance at the lowest levels, to the baton, carotid hold, and other potentially lethal maneuvers at the highest levels.

There are dozens of professional "use-of-force experts," many of whom spend large sums advertising in advocacy journals. When in court, they confidently identify the amount of force needed to subdue a person, often with amazing and

self-serving precision. Most juries, we believe, recognize the impreciseness and dynamics of a violent confrontation. During jury deliberations, officers usually are allowed the necessary latitude to justify their actions.

When, however, force is gratuitously inflicted to cause punishment, jurors are apt to make a different judgment. While they may be repulsed by the criminal and his violence, we believe most jurors demand, as well as most police chiefs, sheriffs, and wardens expect, that officers will restrain their rage and contain their human instincts to summarily punish an offender.

Accepting the Magistrate's findings as we must, the force used in this case exceeds generally accepted professional standards. "In no event is physical force justifiable as punishment." Mandatory Standard 3-4198, *Standards For Adult Correctional Institutions,* Third Edition, American Correctional Association (A.C.A.) in cooperation with the Commission on Accreditation for Corrections (January 1990), p. 64.

The A.C.A. Standards contemplate, and correctional officers recognize, a difference between force used to subdue a prisoner and that which is employed to punish him. The force used to seize a person is judicially measured by the Fourth Amendment test of objective reasonableness; *Graham v. Connor,* 490 U.S. 386 (1989).

We suggest that when force is used for no apparent purpose other than to punish a prisoner, the remedies available under the Eighth Amendment should respond to the practical need to deter and punish officer misconduct. The Magistrate Judge accomplished this objective with his verdict; the Court of Appeals did not, when it chose to deny the plaintiff an adequate remedy.

CONCLUSION

The legal right to use force carries a grave responsibility. Correctional and law enforcement executives must provide extensive training and guidance to their subordinates. The public has a right to expect that the force used by peace officers is carefully regulated by their superiors. The availability of employee disciplinary mechanisms is simply not enough; judicial sanctions are necessary.

We believe the right to be free from officer-imposed physical abuse is of constitutional dimension. The constitution, the civil rights acts, and their application by the courts clearly serve as beacons to guide criminal justice administrators in their development of internal policies and procedures. They also, by necessity, must deter their subordinates who could otherwise inflict painful but minor injuries without legal consequences.

The significant injury test presents the opportunity for abuse. Gratuitous force could be used so long as there are no broken bones or visible signs of injury. For these reasons, we respectfully urge this Court to reverse the Court of Appeals decision below.

Respectfully submitted,

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